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No. 96-1206

IN THE

Supreme Court of the United States

October Term, 1996

JIMMY D. McGUIRE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

*ROBERT B. McDUFF
767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

JENNIFER P. BURKES
SCANLON, SESSUMS, PARKER
& DALLAS
1650 Mirror Lake Plaza
2829 Lakeland Drive
Jackson, Mississippi 39208
(601) 933-2040

Counsel for Petitioner

*Counsel of Record

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In opposing the petition for writ of certiorari, the government contends there is no conflict between the en banc Fifth Circuit's decision in the present case and that of the First Circuit in *United States v. DiRico*, 78 F.3d 732 (1st Cir. 1996). Op. Cert. 8 n.5. However, *DiRico* made it clear that not only does this Court's decision in *United States v. Gaudin*, 115 S.Ct. 2310, 2313 (1995) require that the issue of materiality be submitted to the jury, but it also requires that "the trial judge must properly instruct the jury *on the legal definition of materiality*." 78 F.3d at 736 (emphasis added). In the present case, the Fifth Circuit held that the simple fortuitous mention of the word "material" in jury instruction 36, regarding Count 4, was sufficient to meet *Gaudin's* mandate, even though the jury

was never instructed as to the legal definition of materiality. The conflict between the two courts of appeals is clear and should be resolved by this Court. *See also, United States v. Keys*, 95 F.3d 874, 881 (9th Cir. 1996) (en banc) ("the lack of instructional guidance on the meaning of materiality" indicates reversible error under *Gaudin*).

The government notes that the petitioner requested no definition of materiality at trial. Op. Cert. 8. Of course, such a request would have been frivolous at the time of trial because, under governing Fifth Circuit law, materiality was an issue for the trial judge and not the jury. This demonstrates -- contrary to the government's contention, op. cert. 9 -- the relevance of *United States v. Johnson*, No. 96-203 (argued Feb. 25, 1997), presently pending in this Court. *Johnson* deals with the question of the proper resolution of a *Gaudin* error when there was no objection at trial due to then-governing case law in the circuit. This Court's resolution of *Johnson* will amplify the ramifications of *Gaudin*, including issues of whether a *Gaudin* error is a "structural error," *see, Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993), and whether there is any role for "plain error" analysis. Given that, in the present case, there was no jury instruction on the legal definition of materiality, there was no request for such an instruction due to long-standing circuit precedent, and there was no submission to the jury of the issue of materiality save a fortuituous use of the word "material" in jury instruction 36, this Court either should grant certiorari and set the present case for argument or, alternatively, vacate and remand for reconsideration in light of *Johnson*, which will provide needed guidance regarding the scope and treatment of *Gaudin* errors.

The government suggests there is no prejudice from the failure to instruct the jury on the legal definition of materiality. Op. Cert. 8. However, as Judge DeMoss, joined by two other judges, made clear in his dissent from the en banc majority decision, the absence of a definition was quite prejudicial in a

case where the materiality of the purportedly inaccurate statements was subject to serious question:

> McGuire . . . filed a form 8300 and later filed an amended form 8300 which correctly reported his receipt of the correct sum of money paid to him. The rest of the information on these forms would not produce any decision or action by the Internal Revenue Service and a reasonable jury could conclude that any omission or misstatement in the rest of these forms was *not* material to the Internal Revenue Service. All of which emphasizes the importance of the jury being properly instructed as to the definition of materiality and then being properly permitted to decide the ultimate mixed question of fact and law which *Gaudin* so clearly says is the jury's ultimate decision.

Pet. App. 15-16 (emphasis in original).

In its opposition, the government commits the same error as the en banc Fifth Circuit, relying on the fact that jury instruction 36 mentioned the word "material." Op. Cert. 7. In so doing, both the government and the Fifth Circuit ignore not only the absence of an instruction defining the legal meaning of materiality, but also the presence of instruction 20, which informed the jury: "[Y]ou need not consider whether the false statement was a material false statement, even though that language is used in the indictment. *That is not a question for the jury to decide*." Pet. App. 3 (emphasis added).

By isolating and relying upon the use of the word "material" in instruction 36, and by ignoring instruction 20 and the absence of any evidence or argument to the jury regarding materiality because of then-governing Fifth Circuit precedent, the government and the en banc Fifth Circuit commit the same mistake for which this Court often has taken criminal defendants to task:

> It is well established that the instruction "may not be judged in artificial isolation," but must be considered in the context of the instructions as a whole and the trial record.

Estelle v. McGuire, 502 U.S. 62, 72 (1991), *quoting*, *Cupp v. Naughten*, 414 U.S. 141, 147 (1973).

> [A] judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instructions of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in conviction.

Cupp v. Naughten, 414 U.S. at 147.

> *Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might.* Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Boyde v. California, 494 U.S. 370, 381 (1990) (emphasis added).

In the present case, the jury was told in instruction 20 that materiality "is not a question for the jury to decide." There was no definition of the legal meaning of the word "material." Consistent with governing case law, the parties put on no evidence before the jury regarding materiality and there was no argument by counsel for either side regarding whether the government had met its burden of proof on the materiality

issue.[1] Given this, there is a "reasonable likelihood," *see, Victor v. Nebraska*, 511 U.S. 1, 6 (1994), that the jury believed it was not to decide the issue of materiality regarding *any* of the counts, including the count for which the petitioner was convicted and sent to prison. This danger is not avoided simply by the fortuitious use of the word "material" in instruction 36.[2]

Because the en banc Fifth Circuit's decision so far departs from the recognized principles that "[j]urors do not . . . pars[e] instructions for subtle shades of meaning" and that single instructions "may not be judged in artificial isolation," that decision suggests those principles are to be applied only against criminal defendants and the government is not bound by them. As Judge DeMoss said in his dissent:

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[1] In addition, Count 4 -- the only count for which the petitioner was convicted -- specified a violation of 26 U.S.C. §§ 6051I(f)(1)(B) and 7026(1). Pet. App. 7-8 n.2. The instruction for that count, instruction 36, referenced the requirements of § 6051I(f)(1)(B), but not those of § 7206(1). Pet. App. 3-4. This means, first, that instruction 36 improperly failed to set out all of the elements required for conviction on Count 4, as pointed out by the panel opinion in this case. Pet. App. 41. But it also means that the only reference for the jurors regarding the elements of § 7206(1), which was charged in Count 4, was instruction 20. Instruction 20 related to Count 5, which also charged a § 7206(1) violation. As noted previously, instruction 20 stated that materiality "is not a question for the jury to decide." Pet. App. 3. Because of the allegation of § 7206(1) violations in both Count 4 and Count 5, and because instruction 20 was the only instruction to set out the elements of a § 7206(1) violation, the Count 4 instruction (instruction 36) was inextricably linked to, and infected by, the Count 5 instruction (instruction 20).

[2] *Victor v. Nebraska* cites *Estelle v. McGuire*, 502 U.S. at 72 and n. 4 in support of the "reasonable likelihood" standard, and *Estelle* cites *Boyde v. California*, 494 U.S. at 380. *Boyde* makes it clear that, under this standard, "a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction," but instead must show something more than "a possibility of such an inhibition." *Id.*

> The majority states that the district court did not withhold the element of materiality from the jury but that does not address the issue of whether materiality was properly submitted. If the element of materiality is improperly submitted to the jury that is just as incorrect as not submitting it at all. . . . Interpreting *Gaudin* as defining error only to the extent that the district court expressly withholds materiality from the jury's determination is a stingy and hyper-technical interpretation which is more consistent with a judicial philosophy that says that the primary role of this Court is to sustain a conviction.

Pet. App. 16-17.

The petition should be granted and a writ of certiorari should issue to review the en banc decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

ROBERT B. McDUFF*
767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

JENNIFER P. BURKES
SCANLON, SESSUMS,
PARKER & DALLAS
1650 Mirror Lake Plaza
2829 Lakeland Drive
Jackson, Mississippi 39208
(601) 933-2040

Counsel for Petitioner

* Counsel of Record